

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
ELKINS**

CLIFFORD MERRITT,

Petitioner,

v.

**Civil Action No. 2:10-CV-47
(BAILEY)**

WARDEN ADRIAN HOKE,

Respondent.

ORDER GRANTING RESPONDENT'S MOTION TO ALTER OR AMEND

On this day, the above-styled matter came before this Court for consideration of the respondent's Motion to Alter or Amend [Doc. 36], filed January 20, 2011. In the motion, the respondent asks this Court to amend its January 18, 2011, Order Adopting in Part and Rejecting in Part Opinion/Report and Recommendation [Doc. 34]. Specifically, the respondent asks this Court to correct its clear error of law by "withdraw[ing] its vacating of the Petitioner's conviction, and . . . issu[ing] a conditional release order allowing the State a reasonable period of time to retry the Petitioner." ([Doc. 36] at 4-5). For the reasons that follow, this Court hereby **GRANTS** the respondent's motion [**Doc. 36**].

The power of a federal habeas court "lies to enforce the right of personal liberty; when the right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can only act on the body of the petitioner." *Fay v. Noia*, 372 U.S. 391, 430 (1963). Here, this Court committed a clear error of law when it ordered that the petitioner's conviction and sentence

be vacated.

Instead, “[t]he typical relief granted in federal habeas corpus is a conditional order of release[.]” **Herrera v. Collins**, 506 U.S. 390, 403 (1993). “A conditional release order requires the state to release the petitioner from custody or to retry him in a constitutional manner within a reasonable period of time, typically 30, 60, 90, or 120 days.” 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 33.3, at 1682 (5th ed. 2001).

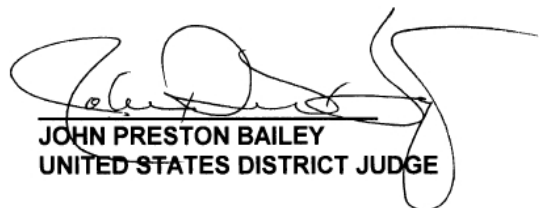
Accordingly, this Court now amends its January 18, 2011, Order to grant the following relief:

The petitioner’s § 2254 Petition [**Doc. 1**] is hereby **GRANTED IN PART** and **DENIED IN PART** and a conditional writ of habeas corpus is hereby **ISSUED**. Accordingly, the respondent must release the petitioner unless, within a reasonable period of time, the State initiates proceedings to retry the petitioner.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record and to mail a copy to the *pro se* plaintiff and the Circuit Court of Harrison County, West Virginia.

DATED: January 21, 2011.


JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE